

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Mark O. Barnett
G. Paul Bollwerk, III

In the Matter of

POWERTECH (USA), INC.

(Dewey-Burdock
In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

March 29, 2018

ORDER

(Requesting Information for the Sixth Telephonic Conference Call)

On March 27, 2018, the Licensing Board held its fifth conference call with the parties since the issuance of its summary disposition ruling in LBP-17-09¹ to discuss the NRC Staff's efforts to resolve Contention 1A, the sole remaining contention in this proceeding.² On March 16, 2018, in letters to each of the parties, the NRC Staff announced that it had selected an approach to identify Lakota Sioux historic, cultural, and religious resources that has the potential to resolve Contention 1A (the March 2018 Approach).³ In the letters, the NRC Staff

¹ See LBP-17-09, 86 NRC 167 (2017).

² Tr. at 1337–69.

³ Letter from Cinthya I. Román, Chief, Environmental Review Branch, to John M. Mays, Chief Operating Officer, Azarga Uranium Corp. (Mar. 16, 2018) (ADAMS Accession No. ML18075A500) [hereinafter March 2018 Letter to Powertech]; Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Trina Lone Hill, Director, Cultural Affairs & Historic Preservation Office, Oglala Sioux Tribe (Mar. 16, 2018) (ADAMS Accession No. ML18075A499) [hereinafter March 2018 Letter to Oglala Sioux Tribe]; Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Consolidated Intervenors (Mar. 16, 2018) (ADAMS Accession No. ML18075A501).

noted that the March 2018 Approach (like the earlier December 2017 proposal)⁴ includes a field survey that relies on the “support and participation of the Lakota Sioux Tribes and Powertech.”⁵ Thus, the NRC Staff requested that Powertech and the Oglala Sioux Tribe each inform the NRC Staff of its ability to “participate in the implementation of the NRC’s approach and timeline” no later than March 30, 2018.⁶

At the March 27, 2018 teleconference, neither Powertech nor the Oglala Sioux Tribe would commit then to participating in the NRC Staff’s March 2018 Approach, but indicated they would provide the NRC Staff with a definitive response by, or a few days after, March 30, 2018.⁷ Nonetheless, counsel for the Oglala Sioux Tribe noted that there were some “outstanding issues” that might impact the Tribe’s decision to participate in the March 2018 Approach, including the issue of whether the Tribe would be reimbursed for expenses and compensated for time spent participating in the survey.⁸ NRC Staff counsel stated that the March 2018 Approach did not directly provide for reimbursement and compensation for Tribal participation, but that the NRC Staff would defer to Powertech on whether Powertech would offer the participating Tribes any form of reimbursement or compensation.⁹ Counsel for Powertech indicated that he could not state at that time whether Powertech would be willing to provide compensation to the Tribes, or whether Powertech would be willing to participate in or support

⁴ Letter from Cinthya I. Román, Chief, Environmental Review Branch, to Trina Lone Hill, Director, Cultural Affairs & Historic Preservation Office, Oglala Sioux Tribe (Dec. 6, 2017) (ADAMS Accession No. ML17340B365).

⁵ March 2018 Letter to Powertech at 2.

⁶ Id. at 5; March 2018 Letter to Oglala Sioux Tribe at 5.

⁷ Tr. at 1344, 1359–60, 1365–66. The Consolidated Intervenor indicated they, in general, viewed [the March 2018 Approach] favorably. Tr. at 1346.

⁸ Tr. at 1354–55.

⁹ Tr. at 1357, 1362.

the NRC Staff's March 2018 Approach.¹⁰

NRC Staff counsel emphasized that timely responses from both Powertech and the Oglala Sioux Tribe are essential to the NRC Staff's ability to adhere to the projected timeline for supplementing the Final Supplemental Environmental Impact Statement.¹¹ Thus the Board proposed, and the parties tentatively agreed, to hold a teleconference among counsel for the parties within a week of the March 27, 2018 Board teleconference in an attempt to resolve any outstanding concerns and provide the NRC Staff with a definitive response on the parties' commitment to participating in the March 2018 Approach.¹² The parties further agreed to a sixth telephonic status conference with the Board between April 4 and 6, 2018.¹³ To this end, the Board requests that one representative of the collective parties contact Board law clerk Sarah Ladin, at sarah.ladin@nrc.gov, no later than April 2, 2018, to provide dates and times (Eastern Time) of availability during that period.¹⁴ The Board further requests that the parties provide the Board with a summary of the discussion at any telephonic conference among counsel no later than one day preceding the sixth telephonic status conference.

Furthermore, given that counsel for the Oglala Sioux Tribe has identified compensation and reimbursement of expenses for their involvement in the field survey and oral histories as a potential obstacle to their participation,¹⁵ the Board strongly encourages the parties to discuss their options for reimbursing and compensating any participating Tribes. In this regard, the Board notes that the Advisory Council on Historic Preservation provides the following guidance

¹⁰ Tr. at 1358–60.

¹¹ Tr. at 1361.

¹² Tr. at 1360–61, 1364–66.

¹³ Tr. at 1360–61, 1367–68.

¹⁴ The Board will, by separate order, establish a date and time for the sixth telephonic status conference.

¹⁵ Tr. at 1354-55.

to agencies conducting field surveys that involve identifying Tribal cultural resources:

[D]uring the identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor. Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by tribes. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable methods.¹⁶

Based on this guidance, the Board encourages Powertech to continue the established practice of materials applicants/licensees providing an honorarium and reimbursement for Tribal expenses in the identification of Tribal religious and cultural resources. Alternatively, the NRC Staff could consider including the expenses for the identification of Tribal resources as part of its planned contract to obtain services to conduct the site survey and oral history interviews.¹⁷

¹⁶ Advisory Council on Historic Preservation, Memorandum on Fees in the Section 106 Review Process at 13 (July 6, 2001) (emphasis added). Although this memorandum pertains to payment for services rendered in the identification phase of the Section 106 process, given similar survey work that heavily relies on a Tribe's time might be done under the National Environmental Policy Act (NEPA) cultural resources review, this guidance document remains instructive.

¹⁷ Other agencies that conduct Tribal cultural and historic resources surveys under both the National Historic Preservation Act and NEPA have internal policies that allow or encourage the agency to provide compensation directly to Tribes or to require that project proponents make funds available for Tribal participants when Tribes act as consultants providing the agency a service to allow completion of an environmental impact statement. See, e.g., Bureau of Land Mgmt., H-1780-1, Improving and Sustaining BLM-Tribal Relations II-4, A2-2, A2-3 (2016); Fed. Commc'ns Comm'n, Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review Pursuant to Section 106 of the National Historic Preservation Act 14 (2004).

Furthermore, the Board encourages the Oglala Sioux Tribe to consider and discuss with both Powertech and the NRC Staff what it would accept as a reasonable honorarium/consultation fee and expense reimbursement.

Lastly, because Powertech did not identify any specific obstacles to its ability to participate in and support the March 2018 Approach, the Board encourages Powertech to review pages three and four of the March 2018 Letter to Powertech in which the NRC Staff notes that to “carry out a productive field survey in a timely manner, the NRC staff will depend upon Powertech to support the field survey” by engaging in seven itemized actions. The Board requests that Powertech’s definitive response to the NRC Staff on its ability to participate in the survey specifically detail whether it will commit to supporting the NRC Staff on each of these seven bulleted items.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

March 29, 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Dewey-Burdock In Situ Recovery Facility))
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Requesting Information for the Sixth Telephonic Conference Call)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA
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[Original signed by Herald Speiser _____]
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Dated at Rockville, Maryland
this 29th day of March, 2018